Dourin bin Murah v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–180 OF 2010
ABDUL WAHAB PATAIL, MOHAMAD ARIFF JJCA AND DAVID WONG J
15 FEBRUARY 2013

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Criminal Law — Murder — Defence — Non-insane automatism — Test for — Whether appellant suffered from non-insane automatism at time of commission of offence — Whether behaviours of appellant showed he knew nature of what he did to deceased — Whether expert medical evidence raised to prove appellant's medical condition — Penal Code s 84

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Criminal Procedure — Appeal — Evidence — Whether trial judge erred in not considering that appellant had no intention to cause death of deceased — Whether appellate interference warranted

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When Datirin bin Julani ('the deceased') was informed that Dourin bin Murah ('the appellant') was angry with him, he left his farm house on his motorcycle to confront him. Not long after the deceased left, his wife heard the sound of a gunshot. When the deceased's wife and another ('PW8') ran in the direction of the gunshot sound, they witnessed the appellant pointing a 'bakakok' or homemade shotgun and firing a shot at the deceased. Both PW8 and PW9 ran away from the scene of the crime. The gunshot sound was also heard by the deceased's daughter and her husband, who were on their way back after collecting latex from the rubber trees. The couple also met the appellant who had threatened them with violence. The postmortem report by the forensic pathologist confirmed that the deceased sustained two gunshot wounds and that his death was caused by the gunshot injury to the head. The appellant was charged with the offence of murder punishable under s 302 of the Penal Code ('Code'). After having given maximum evaluation to the evidence of the prosecution witnesses, the trial judge found that the prosecution had adduced sufficient credible evidence to prove each ingredient of the offence, which if unrebutted would warrant the appellant's conviction. The accused was thus called to enter his defence. The appellant had put up a defence of misfortune that was rejected by the trial judge. Consequently the appellant was convicted of murder and sentenced to the mandatory death sentence. This was the appellant's appeal against that conviction on the grounds that the prosecution had failed to prove that the appellant had intention to cause the death of the deceased and that the trial judge had erred in not considering that the appellant had no intention to cause the death of the deceased. However, in the course of

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the appeal the appellant relied solely on the defence of non-insane automatism to support his lack of intention in shooting the deceased.

Held, dismissing the appeal:

(1) After having reviewed the trial judge's finding in the light of the evidence in its totality it was evident that the trial judge was perfectly correct in calling the appellant to enter his defence (see para 12).

(2) The defence of non-insane automatism was never raised during the trial. That being the case, it could be said that the appellant had failed to pass the threshold test of putting some proof of insanity during the trial. Although the appellant submitted that there was some evidence of insanity raised before the trial, ie that the deceased had cast a spell on the appellant that made him abnormal, this encounter had to be viewed in the light of his other behaviours. The evidence of PW8 and PW9 was clear that the appellant shot the deceased point blank not once but twice while he was on the ground asking for mercy. In addition, after shooting the deceased, the appellant had confronted both the deceased's daughter and her husband and threatened them with violence before hitting another victim, PW12, and rendering her unconscious. These behaviours showed that the appellant knew exactly the nature of what he did to the deceased and the others. Hence the appellant could not avail himself of the defence provided for under s 84 of the Code (see paras 17–18).

(3) Further if the appellant wished to rely on this sort of defence he was required to call expert medical evidence to enlighten the court as to his mental condition. However, there was no such evidence before the court (see para 18).

[Bahasa Malaysia summary

Apabila Datirin bin Julani ('si mati') diberitahu bahawa Dourin bin Murah ('perayu') sangat marah dengannya, dia pergi meninggalkan rumah ladangnya dengan motosikal untuk bersemuka dengan perayu. Sebaik saja si mati meninggalkan rumah, isterinya mendengar bunyi tembakan senapang patah. Apabila isteri si mati dan seorang lain ('PW8') berlari ke arah bunyi tembakan senapang patah, mereka menyaksikan perayu mengacukan 'bakakok' atau senapang patah buatan sendiri dan melepaskan tembakan ke arah si mati. Kedua-dua PW8 dan PW9 melarikan diri daripada tempat jenayah tersebut. Bunyi senapang patah juga didengar oleh anak perempuan si mati dan suaminya, yang dalam perjalanan pulang selepas mengutip lateks daripada pokok getah. Pasangan tersebut juga bertembung dengan perayu yang mengancam mereka dengan kekerasan. Laporan bedah siasat oleh patologi forensik mengesahkan si mati mengalami dua kecederaan tembakan senapang dan kematiannya adalah disebabkan oleh kecederaan tembakan senapang di kepala. Perayu didakwa dengan kesalahan membunuh yang boleh dihukum di

bawah s 302 Kanun Keseksaan ('Kanun'). Selepas memberikan pertimbangan maksima kepada keterangan saksi-saksi pendakwaan, hakim perbicaraan mendapati bahawa pihak pendakwaan telah mengemukakan keterangan yang boleh dipercayai dengan mencukupi untuk membuktikan bahan kesalahan, yang mana jika dipatahkan akan mewajarkan sabitan perayu. Tertuduh dengan itu dipanggil untuk memasukkan pembelaan. Perayu telah membangkitkan pembelaan nasib malang yang ditolak oleh oleh hakim perbicaraan. Akibatnya, perayu disabitkan dengan pembunuhan dan dihukum hukuman kematian mandatori. Ini adalah rayuan perayu terhadap sabitan tersebut atas alasan bahawa pihak pendakwaan telah gagal untuk membuktikan bahawa perayu mempunyai niat untuk menyebabkan kematian si mati dan bahawa hakim perbicaraan telah tersilap dalam tidak mempertimbangkan bahawa perayu tidak mempunyai niat untuk menyebabkan kematian si mati. Walau bagaimanapun, dalam perjalanan rayuan perayu bergantung semata-mata atas pembelaan automatisme tidak siuman untuk menyokong ketiadaan niatnya dalam menembak si mati.

Diputuskan, menolak rayuan:

(1) Selepas menyemak semula dapatan hakim perbicaraan berdasarkan keterangan dalam keseluruhannya adalah jelas bahawa hakim perbicaraan betul dalam memanggil perayu untuk memasukkan pembelaannya (lihat perenggan 12).

(2) Pembelaan automatisme tidak siuman tidak dibangkitkan semasa perbicaraan. Memandangkan ini, ia dapat dikatakan bahawa perayu gagal untuk lulus ujian ambang dengan memasukkan sedikit bukti ketidaksiuman semasa perbicaraan. Walaupun perayu berhujah bahawa terdapat sedikit keterangan tentang tidak siuman dibangkitkan sebelum perbicaraan, iaitu bahawa si mati telah mengenakan sihir ke atas perayu yang membuatkan dia menjadi tak normal, keadaan ini mesti diambil kira berdasarkan tindakan-tindakan lakunya yang lain. Keterangan PW8 dan PW9 adalah jelas bahawa perayu menembak si mati secara dekat bukan sekali tetapi dua kali semasa dia di atas tanah meminta belas kasihan. Selanjutnya selepas menembak si mati, perayu telah bersemuka kedua-dua anak perempuan si mati dan suaminya dan mengugut mereka dengan kekerasan sebelum memukul mangsa lain, PW12, dan menyebabkan dia tidak sedar diri. Tingkah laku ini menunjukkan bahawa perayu tahu dengan tepat sifat apa yang di buat kepada si mati dan yang lain-lain. Maka, perayu tidak dapat menggunakan untuk dirinya pembelaan yang diperuntukkan di bawah s 84 Kanun (lihat perenggan 17–18).

(3) Selanjutnya jika perayu berharap untuk bergantung atas pembelaan

A tersebut dia dikehendaki untuk memanggil keterangan pakar perubatan untuk mendedahkan kepada mahkamah terhadap keadaan mentalnya (lihat perenggan 18)]

Notes

B For cases on defence, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1480–1508.

For cases on evidence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 430–477.

C **Cases referred to**

Abdul Razak bin Dalek v PP [2010] 4 MLJ 725, FC (refd)

John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)

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Legislation referred to

Penal Code ss 84, 302

Appeal from: Criminal Trial Suit No K45–06 of 2009 (High Court, Kota E Kinabalu)

Hamid Ismail (Hamid & Co) for the appellant.

Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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David Wong Dak Wah J:

INTRODUCTION

G **[1]** The appellant was charged in the High Court of Kota Kinabalu for the offence of murder punishable under s 302 of the Penal Code. The charge reads as follows:

> That you, on the 12th July 2008, at about 1.00 p.m., at the rubber plantation, at Kg. H Tenggulun Jaya Sook, in the District of Keningau, in the state of Sabah, did commit murder by causing the death of one DATIRIN BIN JULANI (M), 52 years old and that you have thereby committed an offence punishable under section 302 of the Penal Code.

I **[2]** At the end of the trial the learned judge found the charge had been proved beyond reasonable doubt against the appellant. He then accordingly convicted the appellant of the charge of murder and sentenced him to the mandatory death penalty prescribed by law. Aggrieved with the conviction, the appellant appealed to this court. Having heard this appeal, we unanimously dismissed

the appeal and now give our reasons for the decision.

FACTUAL BACKGROUND

[3] The facts of this appeal are these. On the morning of the fateful day, the deceased was at his farm house with his wife ('PW9'), PW8 and their three daughters. During that morning, his son, namely, Mustaain bin Datirin ('PW6') came over to his farm house to inform the deceased that the appellant was angry with him and fearing that something bad might happen, he left the farm house on his own motorcycle carrying a *parang*. Not long after the deceased left the house, PW9 heard the sound of a gunshot, upon which she and PW8 rushed towards the direction of gunshot noise. As they were neared the place, they saw the appellant pointing a 'Bakakok' (homemade shotgun) and firing a shot at the deceased. It was the testimony of PW9 that the deceased then was laying on the ground with his left hand raised and facing the appellant. Upon seeing what happened, both PW8 and PW9 ran away from the place.

[4] The gunshot sound was also heard by one of the deceased's daughter ('PW10') and his son in law ('PW11'). On their way back after collecting latex from the rubber trees, they had stopped at a farm to collect firewood. As they were preparing to go home, they heard a gunshot sound coming from the direction of the deceased's farm house, upon which they proceeded to the place on a motorcycle driven by PW11. Along the way they met the appellant.

[5] PW10 and PW11 asked the appellant 'why?' ('nokuroh' in Dusun dialect) to which the appellant's response was to point his finger at PW10 and angrily said to her 'you are the descendant of a black magician' ('ikoyu turunan do monindaat' in Dusun dialect). PW10 then asked the appellant who had casted a spell on him to which he said it was her father.

[6] PW10 then asked the appellant what proof he had for making such accusation which made the appellant angrier saying to PW10 'Oh, kamu anak perempuan dia yang berani macam lelaki'. At the same time he shoved the *bakakok* against her right waist causing her to fall on her buttocks and then fired a shot very close to her leg. PW11 tried to pacify the appellant but the appellant pointed the *bakakok* at him instead.

[7] Then the appellant told PW10 and PW11 to check on the deceased who was laying down a little distance away. When PW10 and PW11 saw the deceased, he was laying face down with blood on his head and body. On realising that the deceased was dead, PW11 placed a cap on the deceased's face.

[8] As the appellant was still very angry at that time, PW10 pleaded with the appellant not to harm them telling him that they had a young child and told him that she accepted the manner in which her father had met his death. This calmed down the appellant a little. Thereafter he asked PW10 to get her father's *bakakok* from the house and give to him. Both PW10 and PW11 complied with the request and upon leaving the appellant warned both PW10 and PW11 by saying 'tengoklah kamu akan menderita'.

[9] PW12's testimony is that on the fateful day at about 2pm she met the appellant who was riding a motorcycle. On seeing her, the appellant stopped and alighted from the motorcycle and said to PW12 'kau lagi' and straight away hit her with the *bakakok* he was carrying. PW12 shouted for help but the appellant hit her again with the *bakakok* two more times and she passed out. Later someone brought her to her house before sending her to the hospital.

[10] The testimony of Dr Jessie Hiu @ Jessie ('PW4'), who was the forensic pathologist who performed the postmortem on the body of the deceased, is simply that the deceased death was caused by 'Gunshot injury to the head' — see postmortem examination report (P 14). She confirmed that the deceased sustained two gun shots wounds, one on the left side of the neck and the other in the abdomen. The shot on the neck was directed upward towards the head causing severe fracture of the skull and lacerations of the brain with seven pellets found within the brain matter and one pellet on the scalp. This injury according to her would cause immediate death.

FINDING BY THE HIGH COURT

[11] From the grounds of the learned judge, it can be seen that his finding of a prima facie case was premised on his acceptance of the credibility of the witnesses called by the prosecution. This is what the learned judge said:

> *Whether prima facie case established*
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> Having given maximum evaluation to the evidence of the prosecution, particularly the testimonies of PW8, PW9, PW10, PW11 and PW4 it is clear to me that the prosecution has adduced sufficient credible evidence to prove each ingredient of the offence which ifunrebutted or unexplained would warrant the accused's conviction. I accept the evidence of PW8, PW9, PW10 and PW11 on what transpired before, during and after the deceased was shot dead. Likewise I accept the expert opinion of PW4 that two shots were fired at the deceased and that the gunshot injury to the head was fatal. The evidence of PW8 and PW9 shows beyond any doubt that it was the accused who caused the injury to the deceased's head. The accused's intention when he fired the fatal shot must have been to cause death. Accordingly I called upon the accused to enter his defence.

[12] Having reviewed the learned judge's finding in light of the evidence in its totality, we are in agreement that the learned judge was perfectly correct in calling the appellant to enter his defence. We also add that the learned judge had complied with what was required in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203 which states as follows:

(I) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(II) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'NO' then, a prima facie case has not been made out and the accused should be acquitted;

THE DEFENCE

[13] The appellant had put up a defence of misfortune and this was rejected by the learned judge for the following reasons:

I find no truth whatsoever in this defence, for the following reasons:

(1) One shot may be an accident but not two.

(2) The accused's claim that the deceased was armed with a shotgun is contradicted by PW8 and PW9. There is therefore no question of the deceased pointing any gun at him.

(3) The accused's claim that his *bakakok* exploded and hit the deceased as he was running towards the deceased while holding the bakakok under his right arm pit (*kepit dengan tangan kanan*) is inherently incredible. It has to be a wild imagination conjured up by the accused to prop up his defence.

(4) It is too much of a coincidence that his bakakok was pointing directly towards the deceased, who was 30 metres away, when it suddenly exploded.

(5) Before the second shot was fired the accused pointed the *bakakok* at the deceased as testified by PW8 and PW9. Aiming the gun at the deceased and then firing a shot cannot by any stretch of the imagination be an accidental act.

(6) It is highly improbable that the second shot could hit the deceased's neck if as claimed by the accused, he was in the act of grabbing and pulling away the gun from the deceased when it exploded.

(7) The deceased allegedly aimed his gun at the accused when they crossed path. This if true would be reason enough for the accused to fire at the deceased deliberately in self defence rather than for the gun to fire accidentally.

(8) The accused was very angry with the deceased and was still angry after the shooting as testified by PW10 and PW11. An angry man is more likely to act with deliberation.

As for the trustworthiness of the accused as a witness I do not find him to be a credible witness at all.

CONTENTIONS BY THE APPELLANT

[14] Learned counsel for the appellant in his submission had raised two grounds which are as follows:

(a) the prosecution had failed to prove that the appellant had the intention to kill or cause the death of the deceased; and

(b) the trial judge was wrong not to have considered at the end of trial whether the appellant had the intention to kill or cause the death of the deceased.

[15] However during oral submission, counsel for the appellant relied solely on the defence of non-insane automatism and referred to the case of *Abdul Razak bin Dalek v Public Prosecutor* [2010] 4 MLJ 725 to support his ground of the lack of intention on the part of appellant in shooting the deceased. That being the case, we adjudicated this appeal solely on the contention that the appellant had suffered from non-insane automatism at the time of the commission of the offence.

[16] The principle of law on this sort of defence is succinctly set out in the case of *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509 which at pp 212–213 (MLJ); 516–517 (CLJ) held as follows:

12 The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s 84 of the Penal Code. It states:

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

13 This section exempts a person found to be insane of any criminal responsibility if it is found that he is 'incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law' (see commentary in *Ratanlal and Dirajlal's Law of Crimes*, (25th Ed), p 280). The learned authors there further commented that a person 'is not protected if he knew that what he was doing was wrong, even though he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong.

14 Thus, under s 84 of the Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.

15 There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, (25 Ed) p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi bin Abdul Aziz* [2002] 5 MLJ 233; [2004] 1 CLJ 378:

> It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495; [1998] 1 CLJ 759.

16 When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned i.e, that the accused was incapable of knowing the nature of his act as being wrong or against the law (see *Ratanlal and Dhirajlal's Law of Crimes*, (5th Ed), p 289 et seq).

17 It is also settled law that the burden of proof rests on the person who raises the defence of insanity (see *Juraimi bin Hussein v Public Prosecutor* [1998] 2 CLJ 383 also *Baharom v Public Prosecutor* [1960] 1 MLJ 249; [1960] 1 LNS 9). And it is only the accused person who has this right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see *Public Prosecutor v Misbah bin Saat*).

18 The standard of proof upon the accused raising the defence of insanity is on a balance of probabilities, as in a civil case (*Rajagopal v Public Prosecutor* [1977] 1 MLJ 6; [1976] 1 LNS 122, *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63; [1969] 1 LNS 48). So, if the appellant here is able to show, either from the prosecution or other evidence that he committed the crime but was at that time insane, he cannot be culpable by virtue of s 84 of the Penal Code.

THE COURT ANALYSIS

[17] Firstly it must be pointed out that this defence of non insane automatism was never raised during trial. This, due to the credit of learned counsel for the appellant, was admitted in his submission. That being the case, it can be said that the appellant had failed to pass the threshold test of putting some proof of his insanity during trial.

Be that as it may, learned counsel for the appellant submitted that there is some evidence of such insanity before the trial court and as such the learned judge should have considered them even though it was specifically raised as a defence.

[18] Giving the appellant the greatest latitude, we now examine whether the evidence alluded to by learned counsel is adequate to conclude that the defence of non-insane automatism had been proved by the appellant. The evidence alluded to was the interchange between PW5 and the appellant who had told PW5 that the deceased had 'guna guna' him and as proof showed PW5 his skin disease. In short, the deceased had casted a spell on the appellant which had made him abnormal. This encounter of course must be viewed in light of his other behaviours which are these. The evidence of PW8 and PW9 was quite clear in that the appellant shot the deceased point blank not once but twice while he was on the ground asking for mercy. The deceased also after the incident confronted both PW10 and PW11 and threatened them with violence. He had also hit PW12 resulting her being felled unconscious. These behaviours in our view showed that the appellant knew exactly the nature of what he did to the deceased and the others.

Hence it was our view that the appellant cannot avail himself of the defence provided for under s 84 of the Penal Code. Furthermore this sort of defence requires the calling of expert medical evidence to enlighten the court the mental condition of the appellant. There was no such evidence before the court.

Accordingly for reasons stated above, we dismiss the appeal and affirm the decision of the learned judge.

Appeal dismissed.

Reported by Kohila Nesan